

August 11 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 10-0029

Terry N. Trieweler
TRIEWEILER LAW FIRM
309 Wisconsin
P.O. Box 5509
Whitefish, MT 59937
(406) 862-4597
(406) 862-4685 fax
Email: ttrieweler@centurytel.net

Bob Germany
PITTMAN, GERMANY, ROBERTS
& WELSH, LLP
410 South President Street
Jackson, MS 39201
(602) 948-6200
(601) 948-6187 fax
Email: rgg@pgrwlaw.com

James T. Towe
TOWE LAW OFFICES
502 West Spruce
P.O. Box 7826
Missoula, MT 59807-7826
(406) 829-1669
(406) 327-1518 fax
Email: jamiet@montanadsl.net

Bart Valad
VALAD & VECCHIONE, PLLC
3863 Plaza Drive
Fairfax, VA 22030
(703) 352-4800
(703) 352-4820 fax
Email: bvalad@valadlaw.com

FILED

NOVARTIS PHARMACEUTICALS
CORPORATION

Appellant/Cross Appellee,

vs.

PEGGY STEVENS

Appellee/Cross Appellant.

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APPELLEE'S MOTION FOR
ORAL ARGUMENT

The Appellee/Cross Appellant, Peggy Stevens, moves the court for an order pursuant to Internal Operating Rule I(3)(a) to classify this case for en banc submission and to schedule at least that part of the appeal which relates to the statute of limitations

issue for oral argument.

This motion is made for the reason that the Appellant withheld its argument on appeal regarding a dispositive issue until its reply brief, that the reply brief is filled with misleading argument and mischaracterization of the law on this issue, and raises numerous arguments never previously made in the district court and which could not have been anticipated by the Appellee, and that the Appellee has been denied an opportunity to otherwise respond. Without oral argument, this Court is being asked to decide a critical issue in a major case devoid of the opportunities normally associated with due process.

Counsel for the Appellant has been consulted and objects to this motion.

Procedural Background

The district court denied motions by the Appellant, Novartis Pharmaceuticals Corporation, to dismiss based on the statute of limitations on April 7, 2009 and again on October 8, 2009. The motion was denied for two equally sufficient reasons. The first being that Novartis was properly substituted for a timely-named John Doe defendant. The second being that the statute of limitations was tolled during the pendency of a class action to which Peggy Stevens was a putative member.

NPC appealed the district court's orders regarding the statute of limitations defense but completely failed to address the tolling issue in its opening brief. In response, so that the court would be aware of the issue, Peggy Stevens had to address

an argument that had never been made and therefore speculate, based on NPC's superficial treatment of the issue in the district court, what the argument would be while at the same time confining her argument to an inadequate word limit imposed on her when NPC objected to her motion for permission to file an overlength brief which would have provided her with an adequate opportunity to brief the issues on appeal.

NPC then completely sandbagged not only Peggy Stevens but this Court by loading up its reply brief with its tolling argument including 41 authorities which were never cited to the district court nor previously to this court and which are largely mischaracterized in what Novartis refers to as "Appendix 2" to its brief, which enabled it to circumvent not only the normal procedure for arguing appeals but the word limit that it had previously insisted be imposed on Peggy Stevens.

Counsel for Stevens has read every one of the cases cited by Novartis. It has taken many hours to do so. NPC's brief is filled with misleading arguments, mischaracterized case law, misrepresentation regarding the national status of this issue, and numerous arguments not previously made in the district court and which could not have been anticipated by Peggy Stevens.

Therefore, on July 14, 2010, she moved that NPC's reply brief be stricken, that she be allowed to respond, or in the alternative that this matter be set for oral argument to afford at least a minimal opportunity to address the misrepresentations which have been made.

NPC objected to any response from Peggy Stevens on July 26, 2010, and in the process, repeated its consistent pattern of misrepresentation. It ought not be able to do so from the comfort of some paper-pushing factory in Washington, D.C. It ought to have to stand up in court and do so.

However, on August 3, 2010, this Court entered its unanimous order concluding that a party to an appeal can save its entire argument on a dispositive issue for a reply brief to which no response is allowed. The Court has concluded that hiding arguments until there is no opportunity for a response and, in the process, denying the Court the benefit of fair discussion by both parties is a legitimate “tactical decision”. The Court has concluded that because there is no particular rule addressing this exact circumstance in the rules of procedure, there is nothing that can be done about it. In the process, the Court has sanctioned the kind of gamesmanship that gives rise to contempt for and distrust of the entire civil justice system.

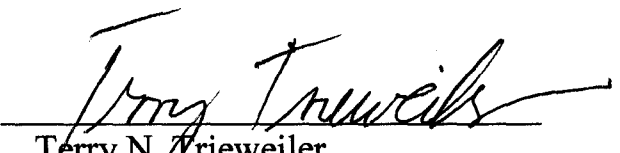
Aside from the fact that allowing a party to structure its argument in a way that denies the other party an opportunity to respond reduces the process to a sporting event and disregarding Peggy Stevens’ significant interest in the matter, it’s not even in the self interest of the members of this Court – all of whom pride themselves on well-informed decisions.

The Court’s decision will determine the law in Montana and the public policy underlying the law. It should not depend on a party’s “tactics” but on an honest and

open discussion of the authority on which the decision will be based. The adversary system depends for its effectiveness on each party being given an opportunity to respond to the other party's arguments. Peggy Stevens has been denied that opportunity based on "tactics" which have now been given the Court's imprimatur, unless oral argument on the limited issue of the statute of limitations is allowed.

This Court's order dated August 3, 2010, did not address oral argument. Therefore, the Appellee, Peggy Stevens, requests that it be addressed in response to this motion.

DATED this 10th day of August, 2010.


By: 
Terry N. Trieweiler
Attorney for Appellee/Cross Appellant

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of August, 2010, a true and exact copy of the foregoing document was served on the Appellant by mailing a copy, postage pre-paid to:

Joe G. Hollingsworth, Esq.
Katharine R. Latimer, Esq.
HOLLINGSWORTH LLP
1350 I St., N.W.
Washington, DC 20005


W. Carl Mendenhall, Esq.
WORDEN THANE P.C.
P.O. BOX 4747
Missoula, MT 59806-4747


Karen R. Weaver

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the Appellee's Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Word 2003, is 893 words, including all text, excluding certificate of service and certificate of compliance.

Dated this 10th day of August, 2010.


Karen R. Weaver